OCT 30 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 34.

EPHRAIM SIMON, APPELLANT,

vs.

SOUTHERN RAILWAY COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

REPLY BRIEF OF APPELLANT.

HENRY L. LAZARUS,
Attorney for Appellant.

HERMAN MICHEL,
ELDON S. LAZARUS,
DAVID SESSLER,
GIRAULT FARRAR,
Of Counsel.

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alleges that "such an act (referring to act 54 of 1904 of the statutes of Louisiana) would be an attempted regulation of interstate commerce and in violation of the Constitution of the United States."

> "And your orator further avers that any judgment rendered upon such attempted citation, would be, if rendered without appearance of the defendant, a judgment without due process of law, and consequently, in violation of said Constitution."
> (Rec., p. 4.)

That appellee has based its contention on the unconstitutionality of act 54 of 1904. (See its brief, p. 96.) The district judge held that act 54 of 1904 was unconstitutional. (See his opinion, Rec., p. 294.)

Furthermore, the SOLE RELIEF PRAYED FOR in the bill of complaint is for a writ of injunction. It reads:

> "* * * your orator therefore prays that the said Ephraim Simon who is plaintiff, as aforesaid, in said action at law, entitled Ephraim Simon *vs.* The Southern Railway Company, No. 74869 Civil District Court for the Parish of Orleans, his counselors, attorneys, solicitors or agents may be restrained by an injunction issuing out of this court **from further proceedings against your orator, under the said suit and judgment, or from issuing execution thereon, or attempting thereunder to seize any property, movable or immovable of your orator, or in any manner attempting to enforce the same.**"
> (Rec., p. 6.)

This prayer for an injunction seeking to restrain the defendant from the execution of the judgment obtained by him in the State court necessarily involved the violation of the statutory prohibition as embodied in section 720, R. S. U. S.

The demurrer (Rec., p. 24), the first pleading filed by appellant, after the issuance by the trial court of the preliminary injunction, squarely raised the issue upon the face

of the bill whether the district court (then circuit court) had power to grant the relief prayed for. The two constitutional questions (the commerce clause and due process) expressly appearing on the face of the bill, and the fundamental Federal issue necessarily involved in the sole relief prayed for, namely, the power and authority of the Federal court to issue its writ of injunction staying proceedings in the State court, demonstrate that the bill was not based "solely" or "entirely" on diversity of citizenship. This court, interpreting the statutes of Congress as to the limits of its jurisdiction, has repeatedly passed upon this question.

In petition addressed to the Circuit Court of Appeals for the allowance of an appeal to this court it is averred that the amount in controversy exceeds the sum of $5,000, and that the bill of complaint of the Southern Railway Co., upon which relief is sought, is based upon two grounds:

> "1st. Diversity of citizenship.
>
> "2d. The claim of complainant that against the enforcement of the judgment complained of and sought to be enjoined, it is averred that complainant's rights were protected under and by virtue of paragraph (3), section (8), article (1) of the Constitution of the U. S., and by section (1) of the Fourteenth Amendment to the Constitution of the U. S.
>
> "That the jurisdiction of the circuit court to grant the relief sought by complainant and the exercise of which jurisdiction was approved and affirmed by this court, **was dependent upon the recognition of complainant's right to the protection of the Federal Constitution, as set out in its bill, without which the circuit court and this court would be without power or jurisdiction to grant the relief prayed for.**
>
> "That the circuit court and the Circuit Court of Appeals upon complainant's bill assumed jurisdiction of said cause, and the Circuit Court of Appeals affirming the judgment of the circuit court, rendered judgment enjoining the execution of the judgment of the State court of Louisiana, in violation of section 720 of the Revised Statutes of the U. S., and that this is a proper case to be reviewed on appeal by the Supreme Court of the U. S."
>
> (Rec., pp. 327-8.)

The third error assigned on this appeal, and directed against the judgment of the Circuit Court of Appeals, is in the following words:

> "That the Circuit Court of Appeals erred in affirming the jurisdiction of the Circuit Court of the United States, based on the averments of complainant's bill, that the judgment of the State court was in its effect and operation violative of article 1, section 8, paragraph 3, of the Constitution of the United States, and of section 1 of the Fourteenth Amendment to the Constitution of the United States; and the court erred further when, by its decree in this cause, it recognized the power and authority of the Circuit Court of the United States to annul a judgment of the Civil District Court of the Parish of Orleans, State of Louisiana, a court of concurrent jurisdiction with the said Circuit Court of the United States."
>
> (Rec., p. 330.)

With complainant's bill and its recitals as you open the record—the petition for an appeal and the assignments of error—how is it possible to advance the suggestion that the bill "raises no constitutional questions," and therefore "the jurisdiction of the circuit court must have been invoked on grounds of diverse citizenship solely," in which event "the judgment of the Circuit Court of Appeals is final, and the present appeal must be dismissed?"

(Appellee's brief, p. 7.)

"Mirabile dictu."

With the constitutional protection invoked by complainant in its bill, and its recognition judicially accorded in defiance of a statutory prohibition, we submit that under the text of the law and the jurisprudence of this court this cause is properly here on appeal for review.

In Ohio R. R. Co. *vs.* Worthington, Mr. Justice Day said:

> "It thus appears that jurisdiction was invoked, not only because the present case is ancillary to the

receivership suit, which depended on diverse citizenship, but upon grounds which involve alleged infractions of the Federal Constitution and rights secured thereby. The case was therefore one which might have been taken to the Circuit Court of Appeals, and the fact that it involved grounds which might have warranted a direct appeal to this court did not deprive the Circuit Court of Appeals of jurisdiction (authorities).

"The question then is: Is this one of the cases made final in the Circuit Court of Appeals by the act creating that court? The sixth section of that act provides that the judgment of the Circuit Court of Appeals 'shall be final in all cases in which the jurisdiction is **dependent entirely** upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different State; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases.' In all other cases there is a right of review by this court if the matter in controversy exceeds one thousand dollars. * * * The case is therefore one not made final in the Circuit Court of Appeals, and the appeal to this court was properly allowed (authorities)."

225 U. S., pp. 104-105.

The jurisdiction of this court to entertain this appeal is undoubted, tested by the rules announced by Mr. Justice Van Devanter in Shulthis *vs.* McDougal (225 U. S., 569). We submit that "from the complainant's statement of its own cause of action as set forth in the bill," it sets out a cause (independently of diversity of citizenship) arising under the Constitution or laws of the United States, upon the construction of which success or defeat depends.

N. P. R. R. *vs.* Soderberg, 188 U. S., 521-527.

L. & N. R. R. *vs.* Cook Brewing Co., 223 U. S., 80.

Am. Sugar Ref. Co. *vs.* N. O., 181 U. S., 281-282.

In **Henningsen** *vs.* **U. S. Fidelity & Guaranty Co.**, 208 U. S., at page 409, Mr. Justice Brewer said:

> "A motion is made to dismiss on the ground that the jurisdiction of the circuit court was invoked solely on the ground of the diversity of citizenship of the parties, and hence the decree of the Circuit Court of Appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and relief were also based on the statutes of the United States, as from the discussion of the merits will be seen. Those **statutes** entered as elements into the decision of the Circuit Court of Appeals, and were necessary elements. **Howard** *vs.* **United States**, 184 U. S., 676; **Warner** *vs.* **Searle & Hereth**, 191 U. S., 195, 205."

Mr. Justice Pitney, in **Hull** *vs.* **Burr** (decided June 22, 1914), gives expression to the "last word" of the court on this question—the case is not only important because of the principle announced, but because it is a case on "all fours" with the instant case, involving the identical question here for consideration and coming here as the instant case from the Circuit Court of Appeals. The learned justice, in delivering the opinion of the court, said:

> "The Circuit Court of Appeals * * * placed its decision upon the ground that the complainants were invoking **not the powers** of the district court in bankruptcy, **but its general powers as a court of equity**; that it also appeared that **the proceedings in Florida** were instituted by a bill in equity, with the parties reversed; that the Florida court was a chancery court and a court of superior jurisdiction in equity and for present purposes of equal dignity and authority with District Court of the U. S. for the District of Mass.; **that the bill in substance merely invoked the general equitable jurisdiction of the district court in order to restrain proceedings in a State court proceeding in equity in a prior suit between the same parties**; and this ran counter to §720 R. S. (§265,

Judicial Code), as well as to the general principle that the authority of the court first acquiring jurisdiction, the parties being the same, must prevail (authorities).

"There is a motion to dismiss the appeal upon the ground that the jurisdiction of the district court depended solely upon diversity of citizenship, and that therefore the decree of the Circuit Court of Appeals is final under §128, Judicial Code * * *. The motion must be granted **unless the suit was one arising under the** LAWS **of the U. S. within the meaning of the first subdivision of §24 of the Code.** The rule is firmly established that a suit does not so arise **unless it really and substantially involves a dispute or controversy respecting the** validity, construction or **effect of some law of the U. S. upon the determination of which the result depends.** And this must appear not by mere inference, but by distinct averments according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts must show, not as a matter of mere inference or argument, but clearly and distinctly, **that the said suit arises under some Federal law** (authorities).

"We have not considered whether the action could be regarded as ancillary to the proceedings in bankruptcy, and for that reason maintainable in the district court as a suit arising under the laws of the U. S. (authorities), **because complainants have not planted themselves upon that ground.** Complainants are not parties to the proceedings in bankruptcy and are setting up rights in opposition to the adjudication and the appointment of trustees therein. **They seek to have the trustees restrained from** prosecuting the equity suit against them in the State court of Florida and to that end undertake to show (*a*) that the bankruptcy proceedings were void for want of jurisdiction; (*b*) that the entire proceedings were a fraud upon the bankrupt act; and (*c*) that, even if the proceedings were valid, the appointment of the trustees was void. **This is the theory of the bill of complaint, and it is by this that the right of ultimate appeal to this court is to be tested,** rather than by the grounds upon

> which the district court and the Circuit Court of Appeals reached conclusions adverse to the relief prayed * * *. We deem, therefore, **that the suit is one arising under the laws of the U. S.**, within the meaning of §24 Judicial Code, and the motion to dismiss will be denied."

On the merits the case was disposed of on the ground that the proceedings were in contravention of section 720 of the Revised Statutes of the U. S.

Aside from every other consideration, the complainant's bill on its face shows that by its cause of action it sought to be relieved from the operative effect of the judgment of the State court, and **the only relief prayed** was to **enjoin** the proceedings in the State court, and this in open disregard of a prohibitory statute of the United States which in terms provides that "the writ of injunction shall not be granted **by any court of the United States** to stay proceedings in any court of a State. * * *"

Therefore, upon the basis of complainant's own statement of the case, there was involved the consideration of the **laws of the United States,** upon the construction of which depended success or defeat.

We therefore submit that the questions involved in this controversy are properly here on appeal for this court's review.

The brief of counsel for appellee is singularly lacking in fairness of statement. It begins with a misstatement minimizing Simon's injuries, which were **before the jury** in the State court, and in satisfaction of which the jury **found** and allowed him compensatory damages. It is not the whole truth to say Simon "had his ankle slightly strained" (Brief, p. 8), nor is it the whole truth to say that "after the accident the railway surgeon examined Simon's injuries and pronounced them **inconsiderable.**" The record facts are that **both** of Simon's **ankles** and **lower limbs** were **seriously injured,** and that his injuries, resulting from the collision on

the line of the Southern Railway, were so far **permanent** that he was a visible cripple and walked with difficulty.

In his petition in the State court Simon alleged that "your petitioner's **ankles** were **severely sprained** and the **ligaments** of his **legs lacerated** and **torn.**"

> "Petitioner represents that although **ten months** have elapsed since the accident and injuries complained of occurred, **petitioner is still suffering from the effects thereof,** and is unable to pursue the course to which he was accustomed, of long walks, and, in changeable weather, **he sustains great pain in his lower limbs and ankles,** and has not the **full** and **free use of his limbs,** as he had prior to the injuries of which complaint is here made."
>
> (Rec., p. 12.)

Simon was present, as is shown on the face of the record, **in propria persona** before the jury, and the jury had **ocular evidence** of the nature and extent of Simon's injuries (Rec., pp. 16-17). The record also shows that the jury heard the testimony of Simon's physician (Dr. Gaudet), who treated him for two months, after making a thorough **diagnosis** (Rec., pp. 48-49). See minutes of State court (Rec., pp. 16-17), attached as an exhibit to the bill of complaint.

Nor is it any nearer to the facts of the record for counsel to state, as he does state in the brief (p. 8), that "Simon **originally** claimed $5,000.00." This statement is shown to be incorrect notably by the affidavit of Henry L. Lazarus (Rec., pp. 31-35), of Ephraim Simon (Rec., pp. 26-31). See particularly deposition of Dr. Martin, complainant's witness (Rec., pp. 186-7).

Appellee (Brief, p. 8) intimates that in the district courts of New Orleans it is the universal custom to have the testimony transcribed stenographically, and counsel for appellee—unfairly, as we think—seeks to point out this fact as being a suspicious circumstance. This charge is not only gratuitous, but is **ultra petitionem.** Furthermore, there is no such "universal custom" in the courts of Louisiana.

Under the laws of Louisiana (Code of Practice, art. 601) it is optional with either party to the controversy "to take down the testimony in writing." The Supreme Court of Louisiana has passed upon this question repeatedly. In the case of the **Succession of John T. Moore,** 42 An., 335, the court, quoting approvingly from **Simon** *vs.* **Howard** (23 La. An., 504), said:

> "We find no note of evidence in the record. In such a case we will presume the court **a qua,** in rendering judgment, proceeded on proper evidence. **Citizens' Bank** *vs.* **Bringier,** 22 An., 20; **State** *vs.* **Monsterio,** 26 An., 634; **Smith** *vs.* **City of New Orleans,** 24 An., 20; **Succession of Pilcher,** 34 An., 362."

and then adds:

> "**The parties were not required to have their evidence reduced to writing or to see that a note is made of the evidence introduced.**"

In this case however the minute entry of the court discloses the names of the witnesses called on the trial on behalf of the plaintiff (Rec., pp. 16-17).

Again, in **Rosenthal** *vs.* **Rosenthal,** 42 So. Rep., 270, the Supreme Court of Louisiana said: "The testimony adduced during the trial is not reduced to writing **unless** at the request of one of the parties (C. P., 601)."

Advised, as the Southern Railway Company's counsel was, from an inspection of the record before the signing of the judgment, (Rec., pp. 25-6) a statement of facts could have been required and the trial judge would have prepared a statement of the evidence as adduced on the trial, so as to enable the appellate court to review the judgment based upon his findings. But no such request was made.

Art. 602 of the Code of Practice of Louisiana provides:

> "When the depositions of witnesses **have not been taken in writing in the inferior court,** the party in-

tending to appeal, or his advocate, must require the adverse party or his advocate, to draw, jointly, with him, a statement of the facts proved in the cause, and this statement thus drawn and signed, either by the parties or their advocates, shall be annexed to the records, and a transcript of the same transmitted to the Supreme Court."

Art. 603, Code of Practice, provides:

> "If the adverse party when required to do so, refuse to join in making out the statement of facts, or if the parties cannot agree as to the manner of drawing the same, **the court, at the request of either, shall make such statement according to their recollection of the facts,** or from the notes they have taken of the evidence."

The judge of the Civil District Court, having seen and heard the witnesses, charging the jury on the law, the consideration to be accorded the verdict, with his independent appreciation of the evidence and the law, expressly adjudged "that the **demand of plaintiff was proved**" (Rec., p. 17).

Appellee in its brief (p. 101) charges that, Simon's injury having befallen him in Alabama, the Louisiana courts were without jurisdiction to entertain his suit. This charge is also **ultra petitionem**. There is not a line in complainant's bill charging that the judgment is void **ratione materiæ**, on the ground that the Louisiana court had no jurisdiction because the accident took place in Alabama. The answer is found in section 2 of act 54 of 1904, which reads:

> "That whenever such corporation shall do **any business of any nature in this State** without having complied with the requirements of this act, it may be sued for **any legal cause of action** in any parish of the State where it may do business * * *."

The finding of the Court of Appeals was that the corporation did do business in Louisiana; hence under the statutes

"it may be sued for any legal cause of action in any parish of the State where it may do business" and its liability is not limited by the terms of the statute to the **locus in quo** of the accident.

In **Barrow Steamship Co.** *vs.* **Kane,** 170 U. S., 100, this court held that "the Circuit Court of the United States held **within the State** had jurisdiction of an action brought by a citizen and resident of **another State,** against a **foreign corporation** doing business in the first State for a cause of action **arising in a foreign country.**" See Railroad *vs.* Harris, 12 Wall., 65.

Was the Southern Railway Company Doing "Any Business of Any Nature Whatever" in the State of Louisiana?

On page 67 of appellee's brief the court's attention is directed to the inquiry:

> "Was the Southern Railway Company doing business in Louisiana in such a sense as to be subject to process in that State?"

In the submission of our brief to this court (p. 69) we regarded this question as foreclosed and concluded, by the express finding of the Circuit Court of Appeals, that "At the time the petition was filed in the State Court by the appellant to recover damages of the appellee, to wit, December 1, 1904, **the latter was doing business in the Parish of Orleans, State of Louisiana**" (Record, p. 310), and that this finding was a final determination on the question of **fact,** the question of **law** upon which the Circuit Court of Appeals pitched its opinion being alone open to review (234 U. S., 380; 232 U. S., 338).

Since, however, the appellee seeks to have this court review the record and the court's finding on this question of fact (Appellee's Brief, pp. 67 to 96), we feel that in justice to the circuit court, to the Circuit Court of Appeals, to the State court, and to ourselves we should fully and **fairly**

advise this court of the **true** facts as disclosed by the record, and upon which the Circuit Court of Appeals based its finding.

We reproduce here the argument submitted to the circuit court and to the Circuit Court of Appeals:

The case as presented, and our observations and comments will be restricted to the evidence, oral and documentary, without regard to the master's report, who under the order complained of (Rec., p. 278-9) undertook to report not only his conclusions, based upon the facts, but his findings of law. We shall ignore the master's report and findings and deal alone with the evidence, respectfully requesting from the hands of this court its independent findings of facts and its appreciation of the law applicable **thereto.**

It is conceded and, if it be not, it is not debatable that under the uniform decisions of the Supreme Court of the United States a State has the power to determine the conditions upon which a foreign corporation can enter into its territory and transact business, and to determine under what conditions, when transacting business, it shall be subjected to the jurisdiction of its courts.

If, therefore, the record establishes the fact that at the time of the institution of Simon's suit against the Southern Railway it was transacting business in the State of Louisiana, and that process was served upon the Secretary of State, who was at the time the **legally** designated **agent** of the complainant, then the jurisdiction of the State court **ratione personæ et ratione materiæ** was perfect and its judgment free from attack or review in this proceeding.

The basis of complainant's bill is:

First. That the Southern Railway Company **was not doing** business in the State of Louisiana, and therefore the Secretary of State, designated by law, was not authorized to receive process subjecting it to the jurisdiction of the courts of the State.

Secondly. That the judgment of the State court, of which complaint is made, was based upon false testimony, and that the judgment rendered was unconscionable.

As to the second contention of the complainant, that the judgment rendered was based upon false evidence and unconscionable, there is not one "jot or tittle" of evidence in this record to support this reckless and wanton charge. All of the **ex parte** affidavits were, by stipulation of record, to be treated as depositions **de bene esse** (Rec., pp. 240, 243), and the verdict rendered by the jury and the judgment rendered by the court, finding by its decree, that the plaintiff's case had been "**proved**" (Rec., p. 17), are a complete and perfect refutation of the insinuations and reckless charges leveled at its correctness. With that question, however, it is respectfully submitted that this court has nothing to do. If it finds either that this court is without jurisdictional power by its injunctive process to stay the proceedings of the State court or that the State court had jurisdiction **ratione personæ et ratione materiæ** to hear and determine the cause, that should end this controversy.

Courts, like individuals, are "inclined to follow the paths of least resistance," when correct results can be reached and justice attained. Therefore, if the court can be convinced that the Southern Railway Company at the institution of these proceedings, was doing business in the State of Louisiana (and we may here add parenthetically, in the language of the statute, "**doing any business of any nature whatever in this State**"), and that by its neglect or from any other cause it failed to designate some one of **its own particular choice to act as its representative,** upon whom process could be served, or that it preferred, as the law will presume it did, the selection made by the State itself, as its representative, upon whom process directed against it should be served, then, we submit, that this court is without power or authority to sit as a reviewing tribunal to correct, review, or reverse the judgment of a State court, a court of co-ordi-

nate and concurrent jurisdiction and power and of equal dignity with the Federal Circuit Court.

In our printed argument we have collated the authorities recognizing the validity of legislation of the different States, providing for service of process upon foreign corporations doing business in the State in which it enters. We apprehend upon the correctness of this proposition there will be no serious contention.

And this brings us to the consideration of the evidence and the controlling factor in this aspect of the case and which should be determinative of the jurisdiction of the State court.

Was the Southern Railway Company doing "**any business of any nature whatever in this State**" at the time of the institution by Simon of his suit?

First. We find in the record the statements of Mr. Trufant, representing the St. Charles Hotel Company, and Mr. Rightor, representing the Morris estate, that for years preceding 1904, during the year 1904, and subsequent thereto the Southern Railway Company, through its executive officers, maintained in the city of New Orleans **two offices**, and as the representatives of said company **two officers** (Rec., pp. 270, 271, 272).

Andrews, the ticket agent of the Southern Railway Company, sold and delivered tickets not only over lines connected with the Southern Railway Company, but **sold and delivered** tickets (independently of connecting carriers) over the independent lines of the Southern Railway Company (Rec., pp. 206, 252).

According to the deposition of Simon, which under stipulation is to be treated as his testimony **de bene esse** (Rec., p. 243), Graham, the soliciting freight agent for the Southern Railway Company, makes contracts in the city of New Orleans on behalf and for account of the Southern Railway Company; that he (Simon) has been repeatedly solicited for shipments over its lines and those of connecting carriers,

and that as a matter of fact he has shipped out of the city of New Orleans merchandise and has received from those holding themselves out to be the representatives of the Southern Railway Company bills of lading or receipts for said shipments (Rec., pp. 80-81).

No attempt was made to meet that evidence, nor was Graham called as a witness on complainant's behalf to refute the statement. If he had been, the defendant would have had an opportunity of showing that contracts were made and entered into in the city of New Orleans by Graham, on behalf of the Southern Railway Company, which he represents, and which maintains its offices in this city under the leases to which we have referred.

By the bills of lading introduced in evidence it is shown that shipments out of New Orleans by Simon himself were receipted for by representatives of the Southern Railway Company, and that checks made payable to the order of the Southern Railway Company, in payment for transportation, were indorsed by it and deposited to the credit of the Southern Railway's account in the banks of New Orleans. (See bills of lading or receipts and checks in evidence, Rec., pp. 263-269.)

Second. The condition of the Southern Railway Company's business was indisputably and admittedly the same in August, **1905,** that it was in December, **1904,** when Simon brought his suit (Rec., p. 194). Therefore, if the Southern Railway was not doing "any business of any nature whatever in this State" in December, 1904, up to and including August, 1905, why did it in August, 1905, nominate and appoint **its particular agent** in the State of Louisiana upon whom legal process could be served?

We care nothing for the self-serving declaration contained in the letter of appointment. We are dealing with the abstract fact that in August, 1905, when the condition of this company's business was identical with what it was in December, 1904, why should the Southern Railway Company have designated and appointed an agent in the State of

Louisiana upon whom process could be served? If the Southern Railway Company was not doing "any business of any nature whatever in this State" in August, 1905, **why** should it have submitted itself, by the appointment of a special agent upon whom process could be served, to the jurisdiction of the courts of Louisiana, and, to repeat, its condition and its operations so far as doing "any business of any nature whatever" in Louisiana were the same in December, 1904, as they were at the time that it selected and appointed its local representative in August, 1905 (Rec., p. 273).

We can explain the absence prior to August, 1905, of a specially designated agent upon whom process could be served, by the Southern Railway Company, upon the **theory:**

That, being advised of the passage of act 54 of 1904, they were content to allow the State of Louisiana to designate for it the Secretary of State as its representative, upon whom process should be served.

It is immaterial to the plaintiff, and to the validity of his judgment, whether the process was served upon the agent of their **implied choice,** the Secretary of State, purposely or through their failure to designate some other person than the State's selected agent, upon whom the process could have been served. Suffice it to say, that the plaintiff in asserting his rights in the courts of Louisiana strictly pursued the law subjecting the corporation to the jurisdiction of the court by service of process upon the company's **only legal** representative in the State of Louisiana. (See our brief in this court, p. 68.)

Is the Southern Railway Company doing "**any** business **of any nature** whatever in this State?" Independently of what we have already said, the evidence in the record authorizes the statement that at the time of the institution of the Simon suit, since then, and down to this hour they are not doing limitedly "any business of any nature whatever," but they are doing a very large and general railroad

business in this State, and we may be permitted to say that this business is being conducted right under the shadow of this very court-house.

And permit us, at this time, to observe that if the Southern Railway Company was **simply** a stockholder in another railroad corporation (the Terminal Company), without undertaking **to control** the operation of that other railroad corporation, **or without controlling** its administration, and having **no other** relation to the corporation in which it held stock than that resulting from its stockholdings and general traffic arrangements and exchange of freights, it would not be doing **a railroad business** in this State, and that is all that was held in the **Peterson case,** in the **205 U. S.**

But what are the relations of the Southern Railway Company to the New Orleans Terminal Company? Who designates its officers, who controls its policy, for whose benefit is it operated, through what agency does the Southern Railway Company operate the Terminal properties, who receives the revenues earned by the operation of the leased Terminal properties?

It is immaterial what disposition is made of those revenues. The question is, does the Southern Railway Company, within the line of its corporate objects and purposes, do "any business of any nature whatever in this State?"

The Terminal Company, as it presently exists, is the successor of the New Orleans & San Francisco Railroad Co. The latter company was organized by notarial charter on the 31st day of **December, 1902** (Rec., p. 68). This corporation, with a subscribed capital of $6,000, was subsequently transformed into the New Orleans Terminal Company by notarial act passed on the 30th day of **June, 1903,** with an authorized capital of $2,000,000 (Rec., p. 75). The evidence shows that the capital stock of $2,000,000 of the Terminal Company is owned one-half by the Frisco system and one-half by the Southern Railway Company. (See lease, Rec., pp. 215-218.)

Let it be borne in mind that the charter of the Terminal Company is a notarial charter and not a legislative grant.

Under the terms of the original charter of the Frisco, which was amended as already referred to, the Terminal Company was invested with power and authority to "lease or to sell its lines of railway in whole or in part" to other companies (pp. 69-70-76).

As a railroad corporation, with the powers of expropriation and as a public-service corporation, we need hardly argue to this court that it could not lease its franchises "in whole or in part" without legislative sanction. (See **Thomas vs. R. R., 101 U. S., 80.)**

The charter of the Terminal Company was passed under the directions of distinguished counsel of this bar on the 31st day of December, 1902, and the power conferred upon it to "lease or to sell its lines of railway in whole or in part to other companies" was derived from, and had for its foundation and authority, act No. 74 of 1902, approved July 2, 1902, six months before the charter of the "Frisco" Terminal Co. was passed. That legislative act accorded to all railroads in this State, whether existing under general or special laws of this **or any other** State, the right to "sell or lease" its railroad properties and franchises to any other railroad company duly organized and existing under the laws of this **or any other** State or Territory, "whenever said contracting company **shall or may** form in the operation thereof, by bridge, ferry or otherwise, connecting or continuous line or lines of railroad." * * *

Section 1 of act 74 of 1902. (See also section 3.)

The testimony of Mr. Finley and the statement of Mr. Hall are to the effect that the acquisition by the Southern Railway Company of the Terminal properties had in view the very purpose indicated by the statute in the grant of power to "lease or sell," the ultimate connection between the Southern Railway Company and the Terminal Company's road, rails and facilities at this port.

The only basis upon which the lease between the Terminal Company and the Southern Railway Co. could have been effected is by virtue of act No. 74 of 1902. The law contemplates that the lessor and lessee shall have in view, under the lease to be effected, the formation of a "connecting or continuous line," or that the leased properties "**may** form," in the future, in the operation of the leased road, a "connecting or continuous line or lines." (See act 74 of 1902, sections 1 and 3.)

That at the time the lease was entered into the contracting parties contemplated the existence of the conditions provided for by law is perfectly manifest from the declarations of Mr. Hall, the solicitor for the complainant and at the time one of the Southern Railway Company's directors of the Terminal Company (Rec. p. 66), and of Mr. Finley, the then vice-president of the Southern Railway Company; and before referring to their "declarations" in the record we desire to attract your honor's attention to the answer made by Mr. Finley to the last question propounded, in which he declares that he "was not assisted in preparing these answers, except clerically" (see deposition of Finley, Rec., p. 207), and, secondly, to the "marvelous coincident" in the exactness of expression of Mr. Finley and Mr. Hall.

In Mr. Hall's deposition (Rec., p. 66, which was filed on May 6, 1905), speaking of the relations of the Southern Railway Company to the New Orleans Terminal Company and the cause of the acquisition by the Southern Railway Company of its interest in the Terminal Company, Mr. Hall said that the Southern Railway Company's interest was acquired "**by reason of the development of the city of New Orleans as an important commercial and export point and in anticipation of a possible extension at some future day of the lines of said railway company into this city.**"

Mr. Finley, speaking of the Southern Railway Company's interest in the properties of the Terminal Company and the cause of its acquisition, said it was "**by reason of the devel-**

opment of the city of New Orleans as an important commercial and export point and in anticipation of a possible extension at some future day of the line of the Southern Railway Company into the city of New Orleans.'' (Finley's answer to seventh interrogatory, Rec., p. 200.)

Accepting the statements of both gentlemen as true, they confirm the defendant's contention that the lease of the Terminal property was under the law of 1902, and hence carried with it the mandatory provisions of that statute.

We have no disposition to comment upon the identical language used by both of the gentlemen referred to in the statement of the objects and purposes of this lease beyond the fact that Mr. Finley, in giving his deposition, said he was not assisted, except clerically, in framing his answers.

The statute provides that, when railroads entering Louisiana avail themselves of the provisions of the act authorizing the selling or the leasing of railroad properties, the purchaser or lessee, if a non-resident corporation,

> "shall have and maintain a domicile and main and general office in the State, and be subject to the control and regulations of the laws of this State, and the railroad commission, **as well as the jurisdiction of the State courts.''**
>
> Section 8 of act 74 of 1902.

Now, let us see by what means and in what manner the Southern Railway Company secured control of the properties of the Terminal Company of this city; when it did, how it did, and how it operates it? We find in the contract of **lease** (and so designated) between the Terminal Company and the Frisco and Southern Railway Companies the recital of the fact that the entire capital stock of the Terminal Company is owned in equal parts by the Frisco Lines and the Southern Railway Company; that is to say, that each company owns $1,000,000 of full-paid stock of the Terminal Company. Now, to repeat what we have already said, if the only relation that the Southern Railway Com-

pany had to the Terminal Company was that of a stockholder in the Terminal Company, we should not press upon the court's consideration the determination of the question based on that independent fact whether they were doing "any business of any nature whatever" in Louisiana; but we find that after the Southern Railway Company and the Frisco Company secured control of the entire stock issued by the Terminal Company, they, by virtue of their stockholdings, selected the officers to operate the properties of the Terminal Company (the officers are selected alternately by the lessees) so that each company, the Frisco and the Southern Railway Company, would have representatives in charge of their respective interests; that having been accomplished, the Southern Railway Company and the Frisco entered into a contract of lease with the officials of the Terminal Company (**officials selected by themselves** and who were their representatives and agents) by which they secured control of the Terminal properties for a period of ninety-nine years. The **lessees** alone are invested with the power to sublet to other railroad companies entering into this city the right of way and the use of the Terminal Company's facilities, and each of the lessees must submit its nominee for acceptance to its co-lessee, and each nominated road, when accepted and granted the use of the Terminal Company's facilities, **attorns** to its nominator for the use it makes and the price that it pays for operating over the leased properties.

To illustrate: The Southern Railway Company nominated the New Orleans and Northeastern R. R. Co., and it operates its cars over the Terminal Company's lines. That company (The N. O. & N. E. R. R. Co.) pays direct to the Southern Railway Company the lease rent for the use it makes of the Terminal Company's facilities. (See testimony of Larz Jones, Rec., p. 246.)

It is true that under the contract of lease the expense of operating the Terminal properties is borne equally by the Frisco and the Southern Railway companies, the lessees, and

there is some testimony that up to this time the properties are not self-sustaining.

Although the Southern may not operate direct **trains** over the Terminal properties, it does handle its **cars** through its nominees over the leased lines, and if in future years the source of revenue would be greater than the operating expenses and fixed charges, the resulting profits would inure to the lessees and not to the Terminal Company.

But whether the Terminal properties are presently self-sustaining or not, whether the lease is a profitable one or not, is immaterial. The Southern Railway Company is conducting business through its selected agency, that business being the operation of the Terminal Company's properties, which the Frisco and Southern Railway Company have under a joint lease.

The Terminal Company is nothing more than the "shadow" of the Frisco and Southern Railway companies; it stands in the position of a "holding company" for the benefit of the two lessees, who have an equal amount of stock in the Terminal Company, and it operates the Terminal properties for the lessees' benefit, through the officials selected by the lessees. In the contract of lease it is provided that the lessees shall have the power and authority to extend the terminal properties, and while ostensibly secondary obligors on the bonds it is perfectly evident from the character of the bond provided for that they are primarily liable; the lessees are the sole beneficiaries of these improvements that the lease contemplates and which the record shows are being continuously made.

It is true that out of the earnings, if there are any, the lessees must provide for the interest upon and ultimate retirement of the bonded debt. It is equally true that they receive the entire revenue. We say the entire revenue because the lease provides that the entire rental paid by the lessees to the Terminal Company is **five** dollars ($5) per annum, although the corporation is capitalized at the enormous sum of $2,000,000. But if there could be any

possible question as to who is operating these properties (this "shell and shadow" being manifestly used as a cloak to conceal the real relations), it should be removed at once by reference to the lease and its conditions, which fix the liability upon the lessees for all injuries in operating the Terminal properties and the conditions under which that liability should be ascertained and determined. The contract to which we have referred is, speaking truthfully, as the parties themselves declared it to be, a "**lease**" of the Terminal properties, notwithstanding the declaration of adverse counsel.

Many reasons may be assigned why just enough life was left in the Terminal Company to preserve legally this "shadow" of corporate existence. The railroad terminal facilities of the city of New Orleans have been circumscribed and limited by earlier grants to the Illinois Central, the Southern Pacific, and what was once the N. O. & Mobile, now the Louisiville and Nashville, and other roads.

The Belt Railroad (a public-service corporation owned and operated by the city of New Orleans) made its appearance, and is intended to be for the public's benefit. The river front being practically monopolized, it is with great difficulty that any other system than those presently operating can enter New Orleans. The conditions imposed are so onerous as in a measure to deprive new companies of advantages of terminal facilities. The Southern Railway and the Frisco companies accomplished the advantage of securing primarily to themselves the facilities of the Terminal system. They might have invaded the Federal laws if they had combined to operate directly the Terminal properties and shut out competing railroads, but with this "shadow and shell" of an existing corporation controlled by them they can indirectly accomplish that which, if undertaken jointly and as the real owners of the property, might have resulted disastrously to their interests.

As the Terminal properties stand today, under the contract of lease with the powers conferred upon the lessees

and those reserved to themselves, they come so near infracing the anti-trust law as at least to invite inquiry, which is destined to come whenever a new road seeks to enter here and the action of the Terminal Company's officials shall appear to be arbitrary or oppressive.

But, to get back to our case: We have the Southern Railway Company under the lease, and as the lessee operating through the agency of its own selection, the properties of the Terminal Company, a business in direct line with their own, only operating under a lease and deriving all the benefits from its operation. And we are told that they are not doing "any business of any nature whatever in this State."

Bear in mind that the stock of the Terminal Company, representing all of the assets, is owned by the Southern Railway and the Frisco Companies. Bear in mind that the enjoyment of all the company's properties has been leased to the Southern Railway and Frisco Companies for ninety-nine years at an insignificant rental of $5.00 per annum. Bear in mind that this contract of lease is nothing more nor less than the lease of the Southern Railway and the Frisco to themselves of the properties of the Terminal Company, the entire issue of stock which they hold, and that that lease was made by the stockholders with themselves, for themselves, and the properties operated by themselves, through the officers of the Terminal Company, selected by the lessees and using the name and corporate existence of the Terminal Company as a cloak to their transaction.

The object and purpose of our statute, subjecting foreign corporations doing "**any business of any nature whatever**" to the jurisdiction of the courts of Louisiana, was manifestly to remove from judicial consideration the **indefiniteness** of the character and quantity of business conducted by the foreign corporation, and to fix **definitely** the conditions under which the State courts should have the right to exercise jurisdiction over foreign corporations.

In other words, to escape from the effect of a conflicting jurisprudence as to the right of the State court to exercise its jurisdiction, dependent upon the character of the business conducted by the foreign corporation and to avoid the judicial determination of the question whether the business conducted was general or special, whether it was within the scope, purposes and objects of the charter of the foreign corporation or not, the legislature of this State, in the exercise of its undoubted power permitting by comity the right to a foreign corporation to transact business in Louisiana, provided in express terms that "**any business of any nature whatever**" conducted by a foreign corporation should subject it to the jurisdiction of the courts of this State, and when the foreign corporation enters upon the territory of Louisiana to transact "any business of any nature whatever" it at once voluntarily subjects itself to the jurisdiction of the courts of Louisiana.

The Supreme Court of this State had occasion recently to review the statutes of Wisconsin. The law of that State with reference to service of process on foreign corporations is identical with the law of Louisiana. The Supreme Court held, in a contest seriously waged by Mr. Buck (who happened to be the master in this case), that a judgment rendered by the Supreme Court of Wisconsin, where the solicitor simply delivered the policy of insurance was an agent, within the meaning of the statute, upon whom service could be made, and that a judgment thus rendered against the foreign company was valid and binding.

We call your honors' particular attention and invite your consideration of the case of **Milwaukee Trust Co. vs. Germania Insurance Company, 106 La., 669.**

From the report submitted by Mr. Buck, who was the master in this case, and from whose report counsel for appellee has made exhaustive extracts (Brief of Appellee, p. 67), it is quite evident that the learned master had not been reconciled to the determination pronounced by the court in

that case, which was in harmony with the general jurisprudence of the country.

Farrier *vs.* **N. E. M. & S. Co.**, 88 Ala., 278 (7 So. Rep., 200).
State *vs.* **Bank**, 108 Ala., 3 (18 So. Rep., 533).
Western R. R. Co. *vs.* **Tally Bates Co.**, 50 So., 541.

These decisions have been in terms affirmed by this court in—

Chattanooga Asso. *vs.* **Denson**, 189 U. S., 409.
Board of Trade *vs.* **Hammond Co.**, 198 U. S., 424.
See **Denver R. R. Co.** *vs.* **Roller**, 100 Fed. Rep., 738.
Bell *vs.* **N. O. & N. E. R. R. Co.**, 59 S. E. Rep., 102 (Ga.).
Cent. of Ga. *vs.* **Eichberg**, 68 Atl. Rep., 690 (Md.).
Norton *vs.* **Atch., T. & S. F. Co.**, 61 Fed. Rep., 618.
Tuchband *vs.* **C. & A. Ry.**, 115 N. Y. Rep., 437.
So. Pacific *vs.* **Allen**, 105 S. W. Rep., 441.
So. Pacific *vs.* **Godfrey**, 107 S. W. Rep., 1135.

The cases cited were decided in the State courts, or were cases removed from the State courts, where the circuit courts of the United States followed the decisions of the State courts on the question of doing business and on the proper agent to be served, and reached the conclusion that solicitation is doing business within the terms of the statute. They show that the State courts interpret their own statutes and lay down the rule that when a foreign corporation does "any" business, even the mere solicitation of freight and passengers, they are subject to the jurisdiction of the domestic State, so that judgment **in personam** can be rendered against such foreign corporations; they show that the State courts consider that certain modes of service **may be entirely sufficient for State purposes**, even though more stringent rules are laid down by the Federal courts in proceedings **originally** instituted in those courts.

Two recent cases from the State of Texas well illustrates the **dictum** of Mr. Justice Moody in the Green case with reference to cases brought in State courts where the court undertakes to interpret the statutes of its own State.

As was said by Mr. Justice Neill, in the case of **Southern Pacific** *vs.* **Allen,** 106 S. W., 441, at page 443:

> "It is contended by the second assignment that the court erred in not sustaining defendant's plea to its jurisdiction. It being undisputed that the Southern Pacific Company is a foreign corporation and that plaintiff's cause of action **arose in Arizona,** the question was whether the company operated a railroad, did business in, or had an agent or representative in El Paso, when the suit was brought and process served. **This was a question of fact for the jury, or the court sitting as a jury, to determine. Audenried** *vs.* **East Coast Milling Co.** (C. C.), 124 Fed., 697. There being evidence tending to support the finding of the trial judge upon the issue, it is not within our province to disturb it. While the evidence introduced pro and con upon the issue is much similar to that in the case of **Peterson** *vs.* **C., R. I. & P. Ry. Co.,** 205 U. S., 364 (27 Sup. Ct., 513; 51 L. ed., 851), it was directed in that case to a motion made by the defendant to quash the service. **In this case the question is one of jurisdiction of the State court, which depends upon the interpretation of the State statute under which it is asserted.** This, it would seem from the opinion in **Green** *vs.* **C., B. & Q. R. Co.,** 205 U. S., 531 (27 Sup. Ct., 595; 51 L. ed., 917), **differentiates the cases. A State court must necessarily construe the law and determine the facts upon which its jurisdiction depends;** and if, in the exercise of this duty, its action is questioned by a Federal court, it may, unless it involves a principle controlled by the Constitution of the United States, reply in the language of St. Paul: 'Who are thou that judgest another man's servant? To his own master he standeth or falleth.' The case in hand cannot, as to the question under consideration be distinguished in any manner from that of **Southern Pacific Company** *vs.*

> **Cranmer**, 101 S. W., 534, and we can perceive no reason why we should not adhere to our opinion in that case."

See, also, **Sou. Pacific** *vs.* **Godfrey**, 107 S. W., 1135.

Circuit Judge Noyes, recognized by the profession as one of the most distinguished of the Federal judiciary, having recently occasion to consider the effectiveness of service of process upon a non-resident corporation doing business in the State of New York, under facts and circumstances not as strong as those disclosed by the record in this case, and reviewing the decision of Mr. Justice Moody in **Green** *vs.* **Chicago, etc., Ry. Co.**, said:

That although that case held that the solicitation of business did not constitute doing business **within the Federal rule**, it was

> "distinguished upon the ground that there were cases **(Denver** *vs.* **Roller, Tuchband** *vs.* **Chicago, etc., Ry., supra)** in which the action was brought in the State court and the question related to **the interpretation of State statutes** and the jurisdiction of State courts. In the **Denver case** the question was raised as in the present case, in the circuit court, **after removal.**"

In this case, the motion to set aside the summon and the service was denied. The court made the distinction between a case originally **brought in the State court and removed** to the Federal court and **a case originally brought in the Federal court.**

In the first instance, the finding of the State court as to service is regarded as conclusive, while the Federal court would apply the rule in the **Green case**, if the action was originally instituted in the Federal court.

We cite this case for the purpose of establishing the doctrine that the State court's finding of fact that a foreign corporation is doing business in the State, and that service upon either its selected or accredited agent is the basis of the

State court's judgment, and is conclusive in the Federal court.

In the case at bar it must be remembered that Simon filed his suit in the State courts of Louisiana; that in that suit he alleged that the Southern Railway Company was doing business in Louisiana; that a trial was had on this issue in the State courts of Louisiana, and that the judgment recites that the cause of action was "**proved;**" that verdict and judgment found, 1st, that the Southern Railway Co. was doing business in Louisiana; 2d, that the mode of service following the Louisiana statute was a sufficient, valid and legal one; the action in the case at bar is an attempt to review the questions of fact decided by the State court, both on the questions of service and the cause of action, **by an independent injunction bill,** restraining Simon from executing his judgment. No action of nullity was ever brought in the State court; no action of nullity has been brought in this court, even if one could be sustained here (see **Barrow** *vs.* **Hunton,** 99 U. S., 80; **Nogue** *vs.* **Clapp,** 101 U. S., 551); the prayer of complainant's petition does not seek the nullity of the judgment of the State court, but is for an absolute injunction, restraining Simon from executing his judgment rendered according to the laws of the State of Louisiana.

If the words of Justice Moody in **Green** *vs.* **Chicago, Burlington & Quincy R. R. Co.** mean anything when he says, "but the above cause of action **was brought in the State court,** and the question was of the interpretation of the State statute and the jurisdiction of the State court" (quoting **Denver** *vs.* **Roller,** 100 Fed., —, and **Tuchband** *vs.* **R. R.,** 115 N. Y., —), they certainly mean that the judgment of the State court **interpreting its own statutes and determining its own jurisdiction** must be held inviolate, and that the judgment rendered by the State court must be given full faith and credit under the Federal Constitution.

As to the question of agency, while in the cases above cited service was made upon some managing clerk or other agent soliciting freight and passenger business, the law

makes no distinction when the service is made upon an official so designated by the State statute where the foreign corporation does not appoint one for the purpose of receiving service of process.

The final analysis of Justice Moody's opinion in the **Green case** removes all limitations and makes each case depend on the facts. He says:

> "Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this (simple solution) is not enough to bring the defendant within the district so that process can be served upon it."

Assuming that the Federal rule is that the mere solicitation of business does not subject foreign railroad corporations to its jurisdiction when suit is brought in the United States courts, the present case certainly does not come within that rule, because it is admitted by the president of the Southern Railway Company that Mr. Andrews sells tickets to purchasers in the city of New Orleans for passage not only through connecting carriers, but directly over the lines of the Southern Railway in other States (Rec., p. 206), and receives the money therefor, and places it in bank for the account of the Southern Railway Company (Rec., p. 269); and, likewise, Graham, the freight agent, through Mr. Bynum, issues bills of lading or receipts for transportation of freight over the lines of the Southern Railway (Rec., p. 263 *et seq.*).

Independently of the maintenance of offices in this city by the Southern Railway Company and the business transacted here through its local agencies, no one can read attentively and intelligently the contract of lease between the Terminal Company and the Southern Railway Company and hesitate in arriving at the inevitable conclusion that, under the lease, the Southern Railway Company is, through its own agency—"the Terminal Company"—doing business

in the city of New Orleans, and when all the facts developed in this case are crystalized and presented in a concrete form who can say, in the face of such overwhelming proof, that the Southern Railway Company was not doing "any business of **any nature** whatever" in this State.

The statute of Louisiana is more comprehensive and broader in its terms with reference to foreign corporations than the statutes of any other State that has come under our observation. It covers the doing of any "**business of any nature whatever in this State,**" and the Federal courts have maintained their jurisdiction over foreign corporations in instances of isolated transactions.

Mr. Justice Day, in **Commercial Co.** *vs.* **Davis,** 213 U. S., p. 245, said:

> "Previous cases in this court have not defined the extent of the business necessary to the presence of a foreign corporation in the State for the purpose of a valid service; **it is sufficient if it is doing business therein.** We are of the opinion that the finding of the court in this case is supported by testimony and that the corporation was doing business in Missouri."

The service of process in the case cited was made upon Dr. Mason, who went into the State of Missouri at the solicitation of the beneficiary with the view to adjust a loss arising out of a policy of insurance issued by the plaintiff in error. The record disclosed the fact that Dr. Mason had authority from the company to adjust and settle the loss. The loss, however, **was not adjusted** or settled. The statute under which process was served upon Dr. Mason provided that it may be made upon "any person within the State **who adjusts or settles the loss.**" The court in construing the statute said that it was intended to reach one having the authority of the company for the purpose named, and that it was immaterial that the loss was not actually settled.

See **Slecher** *vs.* **Pullman Co.,** 170 Fed. Rep., 366.

In **Harvester Co.** *vs.* **Kentucky,** decided by this court on

June 22, 1914, Mr. Justice Day, as the organ of the court, reviewed the earlier decisions and held that the solicitation of orders for merchandise by local agents of a non-resident corporation which are sent to another State to be filled—the articles ordered being delivered within the State and the local agent authorized to receive payment therefor—"amounts to doing business in the State to the extent which will authorize the service of process upon its agents thus engaged." With all the limitations which the Harvester Co. sought to impose upon their solicitors and the restrictions upon their qualified agency, this court held that the Harvester Co. could not evade the jurisdiction of the State court where, through its local agents, it solicited business. The Green case was commented upon and differentiated. The doctrine of that case was held to be "extreme," and while not departing from it, the court was not disposed to extend it. We submit that upon the record, upon the authorities, and upon principle the finding by the Circuit Court of Appeals (and this in harmony with the circuit court and the State court) that "at the time the petition was filed in the State court by the appellant to recover damages of the appellee, to wit, December 1, 1904, the latter was doing business in the Parish of Orleans, State of Louisiana" (Rec., p. 310), was indisputably and absolutely a correct finding.

The Attack upon Act 54 of 1904.

On page 96 of appellee's brief the constitutionality of act 54 of 1904 is assailed. After referring to a number of decisions that are without the remotest application in principle to the instant case, the learned counsel concluded the discussion on this question by saying:

> "On the authority of these decisions we respectfully submit that if the alleged service of process made in this case was the service contemplated by Louisiana act 54 of 1904, then Louisiana act 54 of 1904 is unconstitutional, because it **contemplates** the

> condemnation of a defendant without a hearing. Such a condemnation would be a denial of due process of law * * *. A defendant so condemned could legally invoke the jurisdiction of the Federal court on grounds of diverse citizenship to enjoin his opponent from proceeding to seize his property under such a void judgment."
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> Appellee's Brief, p. 101.

In candor and fairness, act 54 of 1904 "**contemplates**" the service of process upon all foreign corporations doing business in Louisiana, and thus affords them the opportunity to be heard in their defense. The statute in terms directs foreign corporations doing business in the State to name "its agent or agents or other officer in this State upon whom process may be served."

Sec. 1 of act 54 of 1904.

The second section of the act provides that when a foreign corporation "doing any business" in the State, "of any nature," without having **designated** an agent, in obedience to the requirements of section 1, "service of process in such suit may be made upon the Secretary of State, the same and with the same validity as if such corporation had been personally served."

The Southern Railway Co., by failing or neglecting to designate or appoint a particular person as its agent upon whom process could be served, was, (as a foreign corporation doing business in Louisiana,) fully advised that the State would select an agent to represent it, upon whom process **could** be served. Therefore, under the conditions stated, the Secretary of State became its duly accredited agent for the service of process, and it was clearly the duty of the Southern Railway Co. to instruct and direct **its statutory agent** what disposition to make of process directed against it and served on him. (See Appellant's Original Brief, p. 68.) So much for what the learned counsel says the statute "contemplates."

The Constitutionality of the Act.

Assuming that the question could properly be raised in these proceedings, **before this court could be called upon to consider the constitutionality of this legislation, it must be fully advised by the pleadings that the question has been properly raised.**

Complainant's bill only questions the **constitutionality** of act 54 of 1904, when sought to be applied to foreign corporations **not** doing business in Louisiana.

The complainant's attack is upon the jurisdiction of the State court, **ratione personæ,** and the **court's action** in rendering a judgment against a foreign corporation **not doing business** in this State, and therefore not within the terms of the statute.

In other words, the gravamen of complainant's bill is that act 54 of 1904 **is without application to the complainant**, and that any service upon complainant under that act is ineffectual, because it is a **foreign** corporation and **does no business** in the State of Louisiana. Therefore, the inapplicability of the statute.

We cannot impress upon the court too forcibly the fact that **no attack** is made upon the **statute itself** as being in contravention of any article of the Federal Constitution, and the jurisprudence of this court is uniformly to the effect that if a statute is attacked as unconstitutional the pleader must set forth in legal form and by specific allegations wherein the statute is an infringement of or is repugnant to the Federal Constitution.

See **Hanford** *vs.* **Davis,** 163 U. S., 279.

Mr. Justice Day, in **Southern Railway Co.** *vs.* **King,** 217 U. S., 534, said:

> "It is the settled law of this court **that one who would strike down a State statute** as violative of the Federal Constitution, **must bring himself by proper averments and showing** within the class as to whom the act thus attacked is unconstitutional. He must

show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the Federal Constitution. **(Tyler** *vs.* **The Judges,** 179 U. S., 406; **Turpin** *vs.* **Lemon,** 187 U. S., 51, 60; **Hooker** *vs.* **Burr,** 194 U. S., 415; **Hatch** *vs.* **Reardon,** 204 U. S., 152, 160.)"

Applying the principles announced to the complainant's bill, the legislation which is now the subject of consideration is free from attack, and therefore the court, under the well-settled jurisprudence, ought not to pass uninvitedly upon its constitutionality.

Pretermitting the question of specially pleading, in what specific respect the statute is repugnant to the Constitution, the Federal and State courts have uniformly held such statutes valid.

Where the statutes of the several States direct, under certain conditions, service of process on designated public officials, subjecting non-resident corporations doing business in the State to the jurisdiction of the courts, it is exceptional for the statute to direct the disposition of the process by the official served.

The corporation by its inaction accepts the State's designation and selection of its agent, and it is to be presumed that the corporate officials have instructed the designated official what his duties are in connection with process running against it, and its failure to do so is its own neglect.

In none of the cases to which our attention has been attracted has the constitutionality of this class of legislation been questioned on the ground advanced by the learned trial judge and counsel in this case.

As we have already observed, the attack is not on the constitutionality of the **legislative act,** but upon Simon's **action** to subject the Southern Railway Company to the jurisdiction of the State court.

From an "avalanche" of cases we have made the following selections, and which we submit are decisive of the question.

In the case of **Ehrman** *vs.* **Teutonia Insurance Company,** 1 Fed. Rep., 475-78, the court, speaking through Mr. Justice Caldwell, said:

> "The leading provision for the protection of the policy-holder is contained in section 3561. This section is a literal copy of the Pennsylvania statute. (See **Ex parte Schollenberger,** 96 U. S., 369-374, where it is set forth at length in the opinion of the court.) So much of it as is material to this case reads as follows: 'No insurance company, not of this State, nor its agents, shall do business in this State until it has filed with the Auditor of State of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the Auditor of State, or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within this State.'
>
> "The Supreme Court of the United States, speaking of a similar provision in a statute of Ohio, say: 'We find nothing in this provision either unreasonable in itself or in conflict with any principle of public law. It cannot be deemed unreasonable that the State of Ohio should endeavor to secure its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that State and fully subject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the State for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed.' **Lafayette Ins Co.** *vs.* **French et al.,** 18 How., 404.
>
> "And in a later case the court say that if there could be no legal redress short of the seat of the company in another State, the cost of the remedy would in most instances exceed the value of its fruits, and the result would be, to a large extent, immunity from all legal responsibility. **Railroad Co.** *vs.* **Harris,** 12 Wall., 65.
>
> "By the provisions of section 3561 every insurance

company of another State is required to stipulate in terms that service on the auditor shall be service on the company. If the stipulation is filed service may be on the auditor, or the person designated by him, or the agent designated by the company, at the election of the plaintiff. **Cunningham** *vs.* **Southern Express Co.**, 67 N. C., 425. And if the auditor does not designate a party, and the company does not specify an agent, then the auditor alone is the proper person to serve with the process, and such service binds the company.

"That the stipulation was not, in fact, filed with the auditor is of no consequence if the company has done those things which imposed upon it the obligation and duty to file it.

"**The law deduces the agreement on the part of the company to answer in the courts of this State, on service made upon the auditor, from the fact of its doing business in the State; and the presumption, from that fact, of assent to service in the mode prescribed by the statute, is conclusive, and no averment or evidence to the contrary is admissible to defeat the jurisdiction.** The reason of this rule is that the obligation to file the stipulation is imposed for the protection of the citizen dealing with the company, and when, by its own act, its obligation to file the stipulation is perfect, as between the company and the citizen, the company will not be permitted to relieve itself from a liability which the written stipulation would have imposed by pleading its own fraud on the law of the State and her citizens. In such cases the law conclusively presumes that to have been done which law and duty and the rights of the party contracting with the company require to be done. It is a familiar principle that jurisdiction cannot be acquired by fraud, nor can it be evaded by such a fraud as is here attempted to be set up.

"The maxim that no man shall take advantage of his own wrong is as applicable to corporations as to natural persons, and applies as well to the kind of agreement under consideration as to any other.

"Insurance companies incorporated by the laws of one State have no absolute right to do business in

another State, without the consent, express or implied, of the latter State.

"This consent may be given on such terms as the State may think fit to impose, and these conditions are binding on the company, and effect will be given to them in the courts of all the States and the United States. **Lafayette Ins. Co.** *vs.* **French,** 18 How., 404; **Paul** *vs.* **Virginia,** 8 Wall., 168.

" 'One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented and will be bound accordingly.'

"**Railroad Co.** *vs.* **Harris,** 12 Wall., 65.

"The principle established in the case last cited has been affirmed in later cases. **Railway Co.** *vs.* **Whitton,** 13 Wall., 270, 285; **Ex Parte Schollenberger,** 96 U. S., 369; and see **Hayden** *vs.* **Androscoggin Mills,** 1 Fed., 93; **Albright** *vs.* **Empire Pr. Co.,** 18 Albany L. J., 313, S. C., 6 Rep., 673; **Wilson Packing Co.** *vs.* **Hunter,** 7 Rep., 455.

"Upon the admitted facts of this case service upon the auditor was good personal service on the company, and it must appear, or suffer a judgment by default."

The Arkansas statute, which is a literal copy of the Pennsylvania statute, the validity of which was passed upon by this court in **Ex Parte Schollenberger,** 96 U. S., 369-74, is in all essentials like that of act 54 of 1904, in that it provides that a foreign corporation may not do business in the State until it has filed a certain stipulation with the auditor, and upon its failing so to do, the auditor shall become the statutory agent upon whom process may be served, as if by personal citation, and the statute is silent as to what disposition the auditor shall make of the process when served.

In the case at bar the statute requires that a foreign corporation doing business in Louisiana must designate an agent. Upon its failure to designate an agent and comply with the law with reference thereto, service upon the Secretary of State is made as effective as if upon the company itself.

The case of **Knapp, Stout & Co.** *vs.* **National Mutual Fire Insurance Company,** 30 Fed., 607, is one where the statute of Missouri prohibited foreign insurance companies from carrying on business in Missouri until it had filed with the Insurance Commissioner a certificate stipulating that service might be made upon him.

The court, Mr. Justice Brewer, said:

> "**In these cases a default is asked.** The petition alleges that the defendant is a foreign insurance corporation doing business in this State, having agents and officers located here. **Service was made upon the Insurance Commissioner. He declined to receive the summons and copy of the petition that was handed to him, no reason being given therefor.** The service was good if he had power to receive the service. The law of Missouri forbids any foreign insurance company doing business until it has filed with the Insurance Commissioner a certificate stipulating that service upon him shall be personal service upon the company. As it is alleged in the petition that the company was doing business in this State, having agents and officers here, we are to presume that it has complied with the law; and, therefore, **prima facie,** at least, the service is good, and default will be entered."

In our original brief (p. 75) we listed a large number of selected cases of this court, of the Inferior Federal Courts, and the State courts, all holding with perfect unanimity the constitutionality of this class of legislation, and so firmly is the doctrine established and enforced that it is somewhat surprising at this time to hear it questioned, and particularly before this court.

See opinion of Mr. Justice Day in **Inter. Harvester Co.** *vs.* **Kentucky,** decided June 22, 1914.

Act 54 of 1904 has been the subject of consideration by the Supreme Court of Louisiana.

In **Davis** *vs.* **Kenefick,** 121 La., 251, the court held that a foreign corporation doing business in Louisiana may be sued

in any parish where it transacts business if the written declaration of the foreign corporation does not strictly comply with the requirements of the statute.

In that case the company designated St. Landry as its domicile and appointed Francis as its agent, "but failed to mention the other places in the State where it was doing business." Its failure to comply with the requirements of the statute carried with it as a consequence liability to be sued in any parish where it did business, and the court held that it was bound to give effect to the statute.

The facts in the case cited would seem to have invited the consideration of the constitutionality of the statute, inasmuch as this foreign corporation had actually designated its domicile and its agent, and still was held suable in another jurisdiction, and that process served there was effective.

In **Gouner** *vs.* **Missouri Bridge Co.,** 123 La., 966 (referred to in Appellee's Brief, p. 97), there are some **dicta** which, in consequence of their inapplicability to the facts, are without force.

The facts in that case were that the corporation was **not doing business** in the State at the time of the service of process and had no property in the State.

In delivering his opinion Chief Justice Breaux said:

> "The first question which attracted our attention was whether legal service can be made through the Secretary of State **after** a foreign corporation, **temporarily present at one time in the State, had left, and had taken with it all of the holdings it had in the State.** When we will have determined that point, **there will be little else left for decision.**"

Further on he said:

> "It does not follow from the language that it was in contemplation of the legislature that a company might be sued if it **had left** the State **and had left nothing in it of its own.**"

This was all that the court was called upon to decide, and this was all **that was decided** by the court. The validity of the statute as applied to foreign corporations **doing business** in the State **was not questioned,** and could not be, inasmuch as the court found that at the time of service the defendant company **was not** doing business in the State.

The sixth point of the syllabus **prepared by the court** expressly excludes the consideration of the constitutionality of the statute. It reads:

"Point Not Determined."

> "There is no necessity of passing upon the other point, attacking the constitutionality of the statute, as relates to corporations **carrying on business in the State,** when service is made."

Upon the record it cannot be seriously controverted that the Southern Railway Company was doing business in this Parish and State at the time of service of process. It maintained, under contracts of lease with the officials of the railroad company, two offices, and had in the State two officers transacting business for them.

Independently of this fact they were the lessees of the terminal properties in the city of N. O. and operating them through their selected agency. The lease rent from the terminal property was in part accounted for to it under the conditions of the lease. So there can be no question that they were doing business and doing business without a designated agent upon whom process could be served. When the Southern Railway Co. leased the terminal properties it voluntarily submitted itself to the jurisdiction of the State courts (see sec. 8 of act 74 of 1902), to the operation of the statute under which the lease was sanctioned and to the selection of the Secretary of State, as its agent upon whom process could be served.

If the complainant was **not doing business** in the State, nor the lessee of the terminal properties at the time of the

service of process, then it is immaterial to this court whether the act No. 54 of 1904 is or is not constitutional.

It is only upon the determination of the question that the complainant **was doing business,** as the **lessee of the terminal properties,** that this court would be justified if the question could be properly raised in these proceedings to inquire into the constitutionality of this statute.

We again call to the court's attention the recitals of the bill.

The **gravamen** of complainant's bill is that the statute of 1904 was without application to a foreign corporation **not doing business in this State;** that the court had no jurisdiction for the reason recited in the bill, that the complainant **was not doing business** in this State.

There is no averment that if the complainant was doing business that the statute under which service was had is in any respect repugnant to the Federal Constitution.

The Service of Process under Act 54 of 1904.

The Circuit Court of Appeals pitched its entire decision against appellant upon one single point that is **ultra petitionem**—to wit, that the service of citation in Simon's suit in the State court was made on the **Assistant** Secretary of State, and that, hence, it was a method of service not authorized by the letter of the statute of the State of Louisiana, and was, therefore, ineffectual and void. The mode and manner of service of citation **is patent on the face of the record of Simon's suit in the State court.**

It is true that act 54 of 1904 of Louisiana directs the service of process upon the Secretary of State, but the universal and undoubted rule of interpretation with reference to such statutes and statutes *in pari materia* is that the process is to be served on the *office of Secretary of State, and not* upon the *person* filling the office. *Process is directed to the office of the Secretary of State, and not to the individual holding that office.*

The office of Secretary of State in Louisiana is created by the constitution of the State, and the Assistant Secretary of State is a constitutional officer (article 79), with delegation by the constitution of *"authority to perform all the acts and duties of the office of Secretary of State"* (*Ibid.*). So that, under the constitution of Louisiana, the duties of Secretary of State are charged upon both the Secretary of State and his lawfully appointed assistant. And, therefore, service of process upon the Assistant Secretary of State is the service of process upon the Secretary of State, and, therefore, is a compliance with the requirements of act 54 of 1904, directing, under the conditions recited in the act, the service upon the Secretary of State, that is, the office, and not the man.

Aside from the constitutional provision making the Assistant Secretary of State a constitutional officer, and charging him with all the duties of Secretary of State, the statute law of this State, enacted before the adoption of the present Constitution, authorized the appointment of the Assistant Secretary of State, who was

> "fully authorized to perform all or any of the duties or official acts required by law of the Secretary of State during the sickness *or absence for any cause of the latter.*" * * *
>
> Rev. Stats. of 1870, sec. 3523.

The sheriff's return here recites that at the time of service upon the Assistant Secretary of State, John T. Michel, the Secretary of State, "was absent." That fact is not questioned, and is concluded by the finding of the jury and the judgment of the State court. The validity of the service under the constitution and laws of Louisiana was the basis of the State court's jurisdiction to implead a foreign corporation doing business within the State without any *designated* agent. It is unthinkable, as a legal proposition, that the legislature of the State, in providing for service of process upon foreign corporations doing business in Louisiana without such designated agent, in order to subject them

to the jurisdiction of the courts through service of process upon the *office* of Secretary of State, was called upon to incorporate in the statute pre-existing laws authorizing service upon his *constitutional assistant,* duly appointed and qualified, and charged with all the duties of his office, or that it was called upon to recite at length in the statute that which was already the law, independently of the Constitution, that, in the absence of the Secretary of State, service might lawfully be made upon the Assistant Secretary of State.

We submit that, when the constitution of the State and the laws of the State charge the duties of the office of Secretary of State upon his duly appointed Assistant, the service upon such Assistant Secretary of State is, within the terms of the Constitution and the statute, a service upon the Secretary of State.

The Supreme Court of Louisiana, in interpreting the statutes of the State in relation to the duties of the Assistant Secretary of State, has held that the Assistant Secretary of State is charged with the duties of the Secretary of State, and is, when discharging the duties required of him, the Secretary of State.

State *vs.* **Clark,** 46 La. An., 1409.

The bill of complaint in this case, paragraph 5 (Rec., pp. 3, 4), makes it quite clear that, in the opinion of the solicitor who prepared the bill, it was tantamount to the same thing *in fact* and *in law* to serve process on the Assistant Secretary of State as to serve it on the Secretary of State.

The exact language of the bill in that regard is as follows:

> "That said suit was entered in the Civil District Court for the Parish of Orleans, and a citation issued therein and was served on the Assistant Secretary of State of Louisiana on December 3, 1904, said Simon maintaining that your orator was a foreign corporation, doing business in the State of Louisiana, which had not filed in the office of the Secretary of State a written declaration setting forth the locality

> of its domicile and the place or places in this State where it is doing business, and had failed to name an agent upon whom process might be served; and claiming that, by reason thereof and by virtue of act No. 54 of 1904 of the Acts of the General Assembly of the State of Louisiana, he was, in such case and by reason of such omission, *justified in serving said citation on the said Secretary of State.*"

The court will also note the literal terms of the following sentence of paragraph 6 of the bill (Rec., p. 4):

> "And your orator avers that the attempted service of said citation upon the *Secretary* or *Assistant Secretary of State* of Louisiana was not a citation upon your orator," etc.

And the bill proceeds (in the same paragraph) to aver that the act of the legislature of the State, *No. 54 of 1904*, providing for such form of citation, if intended to operate upon a corporation not "transacting business within the limits thereof, and has no agent therein," would be an attempted regulation of interstate commerce by the State, in violation of the Constitution of the United States.

Complainant sought in its bill to seize the jurisdiction of the Federal Court *ratione materiae* by specious averments of fraud—first, that Simon obtained his judgment by false swearing; and, second, that Simon obtained his judgment by falsely alleging and pretending that the Southern Railway Company *was* doing business in Louisiana, while (as complainant alleged) it *was not* doing business in Louisiana, and, hence, that the Southern Railway Company did not come within the purview of act 54 of 1904, and that the mode of service provided by the Louisiana statute *for such cases* did not apply to complainant.

These averments of fraud, as results proved, were merely specious and colorable. We say *colorable*, first, because the Master found that Simon committed no fraud whatsoever; and, second, the Circuit Court of Appeals found that the

Southern Railway Company *was* doing business in this State at the time Simon instituted suit.

These two facts being found in the defendant Simon's favor, the bill is stripped of all equitable grounds, and the jurisdiction *ratione materiae* of the circuit court, sitting as a court of equity, is left barren.

Wherein, then, lies the power of the circuit court, sitting as a court of equity, to enjoin the execution of a State judgment on a purely *legal* ground—namely, on a refined technical construction of act 54 of 1904 as to whether service was made upon the Secretary of State or upon the Assistant Secretary of State? What equitable ground or what equitable theory can be invoked by a Federal court deciding a question of purely *State law?* Upon what basis of equitable jurisdiction can the extraordinary writ of injunction, the most powerful arm of a court of equity, be invoked to grant relief against the execution of a State judgment on legal grounds?

When a party comes into equity he must, in order to obtain relief, show an equitable cause of action, and when he fails in his proof his bill must be dismissed; yet in this case complainant utterly failed to establish its case of alleged fraud against Simon. Both of the averments of complainant's bill relating thereto have been found in favor of the defendant Simon, and yet—wonderful to say and remarkable to relate—after winning his case on the *merits of the bill,* Simon today stands enjoined from executing his judgment because the court has decided a technical moot question of State law in the case against him—namely, that service was made upon the Assistant Secretary of State, instead of upon the Secretary of State—and that decision, too, determined without a word of reference to the constitution of Louisiana, showing the duties of the Assistant Secretary of State as a constitutional officer, and without a word of reference to the statutes of Louisiana, which likewise define his powers.

The court must bear in mind that the bill of complaint contains no allegation that the service upon the office of the Assistant Secretary of State was collusive as between Simon and the Secretary of State, nor could such an allegation have been made. Hence, without a vestige of equitable jurisdiction left in the bill, the court, after finding all the basic facts on the subject of fraud in defendant's favor, instead of at once dismissing the bill, actually has allowed an injunction not justified, we submit, by a single authority cited in its opinion. Nor could such an authority be cited from the English or American courts of equity, which have never permitted the courts of one sovereign, by an independent injunction bill, to grant relief from the judgment entered by the court of another sovereign on the narrow, technical, legal ground of an alleged formal defect in citation, and that independently of the prohibition of section 720 of the United States Revised Statutes.

The case at bar is, we submit, on all-fours with Railway *vs.* Burke, 66 Fed., 83, 88; Blythe *vs.* Hinckley, 84 Fed., 246; Barrow *vs.* Hunton, 99 U. S., 80; Nougue *vs.* Clapp, 101 U. S., 551.

The whole *gravamen* of the bill, and of all of the affidavits, jurats and depositions in the record, we submit, makes certain the fact that it was the *deliberate policy* of the corporation, not to *appear* to be doing business within the State of Louisiana, and not to *appear* to have any *representative* or *agent* within the State upon whom citation or other process could be served; *the bill makes no point whatever of service on the Assistant Secretary of State instead of on the Secretary of State* and the master who originally volunteered this theory when confronted with the constitutional and statutory provisions admitted that if the "absence" of the Secretary of State vested the official functions in his assistant then the service was valid and effective (Rec., p. 164).

The learned counsel for complainant places great reliance upon the decision of the Nevada courts in the case of Lonkey

vs. Keyes Silver Mining Company, 17 L. R. A., p. —. At the outset it is to be observed that that was a decision of the Supreme Court of Nevada, acting upon the record of one of the inferior courts of that State, and it was brought to the Supreme Court of the State by appeal. That court, in passing upon the service (which after all was only an incidental question in the case), interpreted its own statutes, and when an examination is made of the constitution of Nevada and the statutes authorizing the appointment of an Assistant Secretary of State, and the duties with which he is charged, it is perfectly plain that he was not authorized to act for the Secretary of State, except in the performance of "ministerial duties." That is the limitation of the statute.

The office of Secretary of State is created under article V, section 19, of the constitution of Nevada. Under section 20, "The Secretary of State shall keep a true record of the official acts of the legislature and executive departments of the Government, and shall, when required, lay the same, and all matters relative thereto, before either branch of the legislature."

The duties of his office are particularly enumerated in the act concerning the office of Secretary of State, approved February 14, 1865, and embodied in the compiled laws of Nevada, under section 1929 *et seq.* Under section 14 of that act (now 1939, Revised Laws) it is provided: "The Secretary of State shall have power under his hand and seal to appoint a deputy who may during the absence of the Secretary of State from the office, *perform all the duties of a ministerial nature* belonging to the office;" * * *

It is perfectly evident from the statutes that the Deputy Secretary of State of Nevada possesses no power and is without authority to "represent the Secretary of State in his absence," except in the discharge of ministerial duties, while under the laws of Louisiana, the Assistant Secretary of State is, in the absence for any cause of the Secretary of State, invested with authority to perform *all the acts and duties of the Office of Secretay of State* (Rev. Stat., 3523).

Therefore, we submit that the service upon the Assistant Secretary of State in the absence of the Secretary was an effective service, sufficient to subject the Southern Railway Company to the jurisdiction of the State courts, and the State courts' interpretation of the statute is conclusive here under the doctrine announced by this court in the case of Green *vs.* Railway, 205 U. S., 530.

See

Hanover Bridge *vs.* United States, 221 U. S., 206.

A Review of Appellee's Authorities.

On pages 24 and 25 of the brief appellee quotes in black-letter type a **dictum** from **Marshall** *vs.* **Holmes,** 141 U. S., 596, to the effect that an injunction directed to **a party in a suit** at law to enjoin such **party** from enforcing a judgment recovered in a court of a State "would operate directly upon **him** and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to **stay proceedings** in a State court." This extra **dictum** must be read and taken in the light of the facts of that case, which was a **removed** cause with its attendant writs; we submit that to extend its effect to the exigencies of this case, as contended by counsel for the appellee, would bring the **dictum** in open and direct conflict with the express holdings of this court in **Diggs** *vs.* **Wolcott,** 4 Cranch., 179; in **Peck** *vs.* **Jenness,** 7 How., 612-625; in **Haines** *vs.* **Carpenter,** 91 U. S., 254; in **Dial** *vs.* **Reynolds,** 96 U. S., 340; in **Stevens** *vs.* **Bank,** 169 U. S., 432; in **Riggs** *vs.* **Johnson County,** 6 Wall., 195; in **Ill. Cent. R. R.** *vs.* **Sheegog, Adm'r,** 217 U. S., 599, and in **Hull** *vs.* **Burr,** decided by this court at the October term, 1913.

To quote from the leading case of **Peck** *vs.* **Jenness,** 7 How., 625, where counsel sought to make the same distinction as is sought to be made in the brief of appellee by the quotation from **Marshall** *vs.* **Holmes,** this court, speaking through Mr. Justice Grier, said:

"The fact, therefore, that an injunction issues **only to parties** before the court, and not to the court, is **no evasion of the difficulties** that are the necessary result of an **attempt to exercise that power over a party who is a litigant in another and independent forum.**

"The act of Congress of the 2d of March, 1793, ch. 66, sec. 5, declares that a writ of injunction shall not be granted **'to stay proceedings in any court of a State.'** In the case of **Diggs** *vs.* **Wolcott,** 4 Cranch., 419, the decree of the circuit court had enjoined the **defendant** from proceeding in a suit pending in the State court, but this court reversed the decree because it had no jurisdiction to **enjoin proceedings** in a State **court.**"

The doctrine of this case has been followed and approved by this court from the date of this early decision to the present time.

The court will remember that the **only** injunction that was ever issued in **Marshall** *vs.* **Holmes, supra,** was the injunction **issued by the State court** upon the filing of Mrs. Marshall's petition in her action of nullity in that court, and which action she subsequently sought to remove to the U. S. Circuit Court.

Under the doctrine of **Watson** *vs.* **Bondurant,** 103 U. S., 281, 287, and **Lawrence** *vs.* **Railroad Co.,** 121 U. S., 634, 636, the case of **Marshall** *vs.* **Holmes** could not have been taken to the Federal court to obtain an injunction, as that would have been, in the language of this court, in those cases, **"an evasion of the statute."**

Counsel for appellee then proceeds to quote from (Appellee's Brief, p. 25) the case of **Earle** *vs.* **McVeigh,** 95 U. S., 503-507, which case, he says on page 26 of his brief, is "practically on all fours with the case at bar." A reference to the case of **Earle** *vs.* **McVeigh** will show that, **after** the issuance of an injunction **by the State court** to restrain the execution of the judgment at law that had been rendered in favor of the party who was defendant in the injunction suit, the **case was removed** to the United States Court for the Dis-

trict of Virginia, where the injunction granted by the State court **was maintained.** So that **Earle** *vs.* **McVeigh** was **not** an **original independent injunction bill,** filed in the Federal court, but was one of the many cases **removed** to the Federal court, along with all of the writs and proceedings that the State court had granted **before removal.** So that **Earle** *vs.* **McVeigh** is in line with **Watson** *vs.* **Bondurant, supra,** and the other removal cases.

Furthermore, it will be observed that in **all of the cases** removed from the State to the Federal courts, where the bill was filed in the State court **for a writ of injunction,** the injunction bill was invariably an **ancillary proceeding** to the proceeding at law, and was brought originally in the **same court** or in the **same jurisdiction** and under the **same sovereignty** where the action at law was pending. Of such cases the Federal court takes jurisdiction only by virtue of the **removal statute,** which allows the case to be removed **in toto** with **all of its processes and proceedings.**

Appellee's counsel then proceeds to quote the case of **National Surety Company of New York** *et al. vs.* **The State Bank,** 120 Fed., 523 (Brief, p. 26). The reasoning of this remarkable decision, as we have already pointed out in our original brief (p. 46), is contrary to the **settled jurisprudence** of this court. The theory of this decision is that the Federal court may act upon the **party defendant** in a suit in equity to restrain the **defendant** from proceeding on or executing his judgment at law recovered in a court of a State (Appellee's Brief, p. 29). This is in **direct conflict** with the authorities cited **supra.** This opinion proceeds upon an utter misapprehension of the facts in the case of **Marshall** *vs.* **Holmes, supra,** in **assuming that an injunction was originally issued in that case by the Federal court,** and **overlooks** the unbroken line of decisions of this court (see our Original Brief, p. 37), holding that an injunction of the **Federal court** directed against a **party** in a suit at law, in the **State court,** restraining **him** from enforcing or proceeding on his judgment, is a **staying of proceedings** in the State

court in **plain violation** of the terms of section 720, Rev. St. U. S., now section 265, Judicial Code.

The other cases cited by appellee, beginning with **Marine Insurance Co.** *vs.* **Hodgson,** 7 Cranch., 332, have no application to the point now under discussion (Brief, pp. 31-35). These cases only apply where an injunction is issued by the Federal courts to relieve against judgments at law **obtained in the Federal court,** or where a judgment of a State court is **sued on** or is **set up,** by way of defense, in a Federal court. The bills in those cases where an injunction was prayed for are necessarily of an **ancillary** nature, and must be filed in the same court of the United States wherein the judgment at law was rendered.

On page 34 of appellee's brief counsel seeks to point out that appellant conceded at the bar of the trial court that the injunctive relief sought by complainant herein could have been afforded in a proper suit brought in the State court. Counsel for appellant not only makes the same admission here, but contends that the fact that the **State court** had **full power** to give relief in equity by an **ancillary** proceeding is the **very reason why,** as pointed out by Mr. Justice Story, the Federal courts were **prohibited** from entertaining **original independent injunction bills** to stay proceedings in the State courts, and throughout the length of appellee's brief your honors will find **no case** decided by the Supreme Court of the United States cited as a precedent for any such mode of procedure.

We have already analyzed the cases of **Johnson** *vs.* **Waters,** 111 U. S., 640, and **Arrowsmith** *vs.* **Gleason,** 129 U. S., 86, in our original brief, page 32. No injunction was asked for or granted by the Federal court in either case to stay any proceedings in the State court.

Cole *vs.* **Cunningham,** 133 U. S., 107, was an action brought in the State court of the County of Suffolk, Massachusetts, to restrain the defendants, who were citizens of that State, from bringing suits **in the State of New York,** for the evident purpose of obtaining a **preference over other cred-**

itors of an insolvent citizen of the State of Massachusetts. It was held that the entertaining by the equity courts of a State of such a suit was no violation of the **full-faith-and-credit clause** of the Constitution of the United States, since such courts had the undoubted power to control persons within their jurisdiction in prosecuting suits in **another State.** No contention was made or involved in that case that a Federal court had power to issue an injunction to stay proceedings in a State court and section 720, R. S. U. S., was in no manner involved.

Appellee's sole reliance appears, after all, to be **Marshall** *vs.* **Holmes,** 141 U. S., 596, since he **requotes,** at pages 40, 41, 42, and 43 of his brief, substantially the **same matter** from that case that he had quoted on pages 22, 23, and 24 of the same brief. He follows up **Marshall** *vs.* **Holmes** with the case of **Terre Haute & Indianapolis R. R. Co.** *vs.* **Peoria & P. U. R. R. Co.,** 82 Fed., 943-946. This case is based upon **Marshall** *vs.* **Holmes,** and to show how far the learned judge (Circuit Judge Grosscup) misunderstood the case of **Marshall** *vs.* **Holmes** and its application, **as a precedent** or **as an authority** in the case before him, we quote (p. 946):

> "Such a case was **Marshall** *vs.* **Holmes,** 141 U. S., 589; 12 Sup. Ct., 62. That action was **begun originally in the Federal court,** upon the ground that such judgment had been obtained by the fraud of one of the parties in forging the plaintiff's signature to a paper, on the strength of which alone the judgment was obtained.
>
> "The injunction was issued in aid of the **main purpose of the suit,** restraining the **judgment creditor from issuing an execution upon such judgment, pending final decree.**"

The only injunction that was issued in **Marshall** *vs.* **Holmes** was issued by the **State court.** Judge Grosscup evidently then misunderstood the **fundamental facts** of **Marshall** *vs.* **Holmes,** and therefore **misconceived** the doctrine of that case and its bearing and value as a precedent. How-

ever, his remarks as to section 720 are, after all, purely **obiter dicta,** for the reason that the motion for an injunction in the case before him was **overruled.** (See 82 Fed. Rep., p. 947.)

Conclusion.

Appellee's counsel close their brief with an extraordinary discussion of the question of fraud (Appellee's Brief, p. 112). notwithstanding the master's report that the evidence in the case does not justify the charge and his findings not questioned by either court (Rec., pp. 170-1), they then attempt to **bolster** up their contentions by quotation of **ex parte** testimony, delivered more than **four years after the occurrence of the events testified to, and almost five years after the verdict** (Rec., pp. 177-179), to impeach the **quantum** of damages found by the verdict of the jury in the State court. This discussion must be intended as a **prayerful** suggestion to this high tribunal that it ought to **bend** a long line of venerable and well-established **precedents,** or even to **make a bad one** in this case, in order to relieve the Southern Railway Company, which is sought to be compelled to pay the damages which it admittedly inflicted and **which a jury found** and which an **upright State court judge approved,** after **seeing and hearing the appellant, his doctor, and the other witnesses to the facts.** (See State court minutes attached as an exhibit to the bill of complaint, Rec., pp. 16, 17.)

We make this statement solely for the reason that it is **not possible to suppose** that the learned counsel for appellee can be so unfamiliar with fundamental principles as to offer this matter as a **serious discussion** of the equitable doctrine for relief against fraud, or of the fundamentals which a case charging fraud must present, in order that a court of equity may afford relief from a verdict and judgment in a suit at law.

After their client, the Southern Railway Company, had studiously **disregarded** and **ignored the State law and the State courts** and sought to escape the legal consequences

of its **own acts** by invoking the protection of a Federal injunction, the **granting** of which involved the **violation of a prohibitory Federal statute,** counsel now make a last desperate attempt to **justify** the conduct of their client by making bold in their brief to have this court **ignore** and **disregard** the **Seventh Amendment to the Constitution of the United States,** which in plain terms provides that "**no fact tried by a jury shall be otherwise examined in any court of the United States than according to the principles of the common law.**"

Chicago, Burlington, &c., R. R. *vs.* Chicago, 166 U. S., 242.

Chgo. *et al.* Traction *vs.* Hof, 174 U. S., 13.

But appellee does not stop **even here.** Its counsel suggest that the **resort** by the appellant **to a trial by jury** to establish his damages in confirmation of the default, was a **further index of fraud!** (Appellee's Brief, p. 114.)

Not only does appellee point to, as still another **index** of fraud, the polite refusal by Simon's counsel to accept a nominal sum, in **full settlement** of Simon's damages, but they actually misstate the record and overstep the statements of complainant's own witnesses,—whose special function it was to minimize all claims for personal injuries when made against the Southern Railway Company,—in stating that Simon's counsel offered to accept $5,000 in full **settlement** before suit was brought. (**See testimony of Dr. Martin,** Rec., pp. 185, 186, 187; **Kennedy,** Rec., p. 208; **Shumate,** Rec., pp. 60, 212, 213.) It is very plain, from the undisputed facts of the record, that not only was counsel's pollicitation of $5,000, if the figure is correctly stated, which we deny, an **unaccepted offer** of compromise, but also that the parties then and there conducting the negotiations were so widely apart in their figures that further discussion was found to be and **was stated to be** utterly useless (Rec., p. 187). These tentative negotiations also, as shown by the record, occurred at a time when counsel for Simon did not have the data as to Simon's injuries, suffering, damages, expenses, or other losses, growing out of the railway

collision complained of (Rec., p. 8). The fraud allegations in the bill, indefinite as they are, were not only false and meretricious, no evidence having been tendered to support them, but the slightest inquiry in New Orleans as to who Ephraim Simon was, would have suggested to counsel that this man's character and record were too fair and clean to justify the charges of magnifying his claim for damages by false swearing and malingering in reference to his sufferings. The record shows without dispute, and without countervailing proof, that in civic, financial, and social circles in New Orleans, where he has dwelt for nearly half a century, Ephraim Simon is known to be a man of the highest moral character and business integrity and a citizen without reproach (Rec., pp. 37-49).

We submit that no case of fraud or other equitable ground of relief is made out on the **face of complainant's bill, and certainly as the master found there was no evidence offered in support of it,** and that the further the argument on behalf of the Southern Railway Company is advanced in this case the more clearly does it appear that its bill of complaint was known to be barren of equitable merit when drawn and directed to be filed, and that its whole case was a made up case without regard either to the LAW OF THE LAND or to the facts that were within easy reach.

It is therefore submitted that the decree of the Circuit Court of Appeals for the Fifth Circuit should be **reversed** and that this cause should be **remanded** to the trial court, with directions to dismiss the bill for want of equity. All of which is most respectfully submitted.

HENRY L. LAZARUS,
Attorney for Appellant.

HERMAN MICHEL,
ELDON S. LAZARUS,
DAVID SESSLER,
GIRAULT FARRAR,
Of Counsel.